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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANTHONY G., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SAMANTHA G.,

Defendant and Appellant.

D050241

(Super. Ct. No. NJ13096)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M.
Elias, Judge. Affirmed.

Samantha G. appeals the judgment terminating her parental rights over Anthony
G. She contends the juvenile court erred by denying her Welfare and Institutions Code

section 388¹ modification petition and by declining to apply the beneficial relationship and sibling relationship exceptions to termination (§ 366.26, subds. (c)(1)(A), (c)(1)(E)). We affirm.

BACKGROUND

In April 2005, when Anthony was five and one-half years old, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition for the following reasons. Samantha failed to monitor Anthony's urine properly and failed to take him to medical appointments for monitoring and treatment of his nephrotic syndrome. As a result, he was hospitalized on April 17 with severe edema of the scrotum and genital area and severe pain. Samantha did not visit him in the hospital. She had a history of missing medical appointments to monitor his condition.

Anthony was detained in the hospital until April 26, 2005, and then detained in a foster home. In June, the court ordered him placed in the foster home. In August, he was moved to Polinsky Children's Center (Polinsky) because the foster parent could not handle his aggressive behavior. In December 2005 or January 2006, he was moved to a prospective adoptive home. He was returned to Polinsky in March after he exposed himself to two younger foster children in that home. Two months later, after the younger foster children were returned to their homes, Anthony was moved back to the prospective adoptive home. The foster father had an approved home study and was committed to adopting Anthony.

¹ Statutory references are to the Welfare and Institutions Code.

The hearing on the section 388 petition and the section 366.26 hearing took place in January 2007.

THE SECTION 388 PETITION

The juvenile court may modify an order if a petitioning party shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the dependent child's best interests. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 322; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) We review the juvenile court's order for an abuse of discretion. (*In re Michael B.*, at p. 1704; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

Samantha's section 388 petition, filed on November 27, 2006, sought to modify the court's July 13, 2006, 12-month review order terminating reunification services and setting the section 366.26 hearing. The petition requested that services be reinstated to the 18-month date "and or" Anthony be returned to Samantha's care. As changes of circumstances, it alleged Samantha had been in inpatient treatment since September 7; had been "diligently working [on] the initial issues that brought her to the attention of the Court"; was "taking a parenting class, [individual] therapy, relapse prevention and other recovery based classes"; and visited Anthony consistently. The petition alleged the proposed change was in Anthony's best interest because they had a strong bond, Samantha's program "would allow her to have her son with her," and she had "worked on the issues that posed a risk to her son and she [was] no longer a risk to her child."

While, as the juvenile court noted, Samantha had made positive changes, she was in the early stages of sobriety and recovery from methamphetamine use. She entered an inpatient drug treatment program in September 2006 while she was pregnant. She had been in the year-long program for only four months, was in the first phase of the four

phases, had not begun working the 12 steps, did not yet have a sponsor, and had been sober for only six or seven months. While Anthony could live in the facility with Samantha, as did his twin brother Matthew² and Samantha's twin babies,³ he needed stability. Until she entered treatment, Samantha had been in jail and had been moving from place to place. After she completed treatment, she planned to move out of state, probably to North Carolina where her father resided. Samantha had previously entered drug treatment while she was pregnant with Anthony and Matthew, and completed the year-long program just after they were born. She relapsed after almost six years of sobriety, just after Anthony was detained.

The court correctly concluded it would not be in Anthony's best interests to remove him from the foster home where he felt wanted and place him in a home where he would probably receive less attention. The focus at the section 388 hearing was on Anthony's need for permanency and stability, not on Samantha's interests. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 324.) He had been extremely hurt by her many missed visits throughout most of the case. He had been out of her care for one year nine months, and in the care of his foster father for a year. He thrived on the individual attention he received from his foster father. He was bonded to his foster father, called him dad or daddy, and wanted to remain with him. The foster father was patient, calm,

² At the outset of this case, Matthew was living in Mexico with the maternal step-grandfather. He is not a subject of this proceeding.

³ These twins were born in January 2007.

and easy going, strict and firm when he needed to be, but not harsh or judgmental. Anthony's problematic behavior had improved greatly under his care. Anthony felt comfortable and secure in his prospective adoptive home. Both his therapist and the social worker believed that it was in Anthony's best interests to be adopted. He needed permanency, stability and security. Those needs would not be served by returning him to Samantha's custody or by reinstating her services and thereby delaying permanency.

The court did not abuse its discretion by granting the section 388 petition.

THE BENEFICIAL RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1) requires termination of parental rights upon clear and convincing evidence of adoptability, but an exception exists if "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) The existence of a beneficial relationship is determined, in part, by "[t]he age of the child, the portion of the

child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at p. 576.)

Examining the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the finding that Samantha's visitation was not regular until September 2006 when she entered residential substance abuse treatment, and she had not met her burden of showing the beneficial relationship exception applied. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 576-577; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

Samantha first visited Anthony in late November 2005. She did not visit again until March or April 2006, when he was in Polinsky for two months. She visited him regularly there, but after he was returned to his prospective adoptive home she did not visit again until September, when she entered residential treatment. Thus, the juvenile court properly observed that since September, "at the eleventh hour of the case, [Samantha's] visitation was consistent."

By the time of the section 366.26 hearing, Anthony was seven years old. He had not lived with Samantha for approximately one year nine months, but he enjoyed visits and said he was happy to see her. She was appropriate during visits and visits went well. She and Anthony were affectionate with each other. He was sometimes sad when visits ended. When visits resumed in September 2006, however, his behavior, which had improved, became problematic again for a time.

Anthony's therapist testified that Anthony consistently said he wanted to be with his foster father. Anthony had "settled in" his prospective adoptive home, saw it "as a

home environment" and was "doing really well." The therapist testified that it was important for Anthony keep seeing Samantha, and in the long term a lack of contact would be detrimental to him. The therapist also testified, however, that it was in Anthony's best interests to be adopted, and there would be a significant impact on him if he felt he might be removed from his foster father's home.

According to the social worker, while Anthony would experience some grief and loss if parental rights were terminated, the loss of his relationship with Samantha would not be so emotionally detrimental that it would outweigh the benefits of adoption. Samantha's failure to visit consistently until September 2006 had been extremely detrimental to Anthony. The chaos in his life had caused him to experience behavioral problems and to fall behind in school. Anthony was bonded to his foster father, affectionate with him and thriving in his care. All of Anthony's emotional needs were met in the prospective adoptive home, and he needed the constant attention to his medical condition that his foster father provided. Anthony also needed the stability and security of adoption so he could focus on being a child instead of worrying about where he was going to live.

The juvenile court did not err by failing to apply section 366.26, subdivision (c)(1)(A).

THE SIBLING RELATIONSHIP EXCEPTION

Another exception to termination of parental rights exists if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the

child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).) The juvenile court is "to balance the benefit of the child's relationship with . . . [his] siblings against the benefit to the child of gaining a permanent home by adoption in the same manner the court balances the benefit of the child's continued relationship with the parent against the benefit to the child of gaining a permanent home by adoption when considering the section 366.26, subdivision (c)(1)(A) exception. The court must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "To show a substantial interference with a sibling relationship, the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child." (*In re L. Y. L.*, at p. 952.) Examining the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the conclusion the

sibling relationship exception did not apply here. (*Id.* at pp. 947, 953.)⁴

Anthony and Matthew apparently lived together from their births in September 1999 until Anthony was detained in April 2005. After April 2005, they did not see each other again until November 2006, aside from a few visits when Anthony was in Polinsky. Anthony said he missed Matthew.

From November 2006 until the time of the hearing, Anthony and Matthew had approximately nine visits. They were affectionate and happy to see each other. They enjoyed visits and called each other "brother." Samantha testified they were close.

Anthony's therapist was unsure whether Anthony understood who was his brother and who was not, because he called other children "brother." The therapist testified that in the long term it would be detrimental to Anthony if contact with Matthew ended, but it was in Anthony's best interests to be adopted and, as mentioned above, there would be a significant impact on him if he believed he might be removed from his prospective adoptive home.

The social worker believed there was a sibling bond and Anthony would experience some grief and loss if his relationship with Matthew were severed. She believed, however, this would be outweighed by the benefits of adoption outlined above.

⁴ Samantha contends the sibling relationship exception applies to Anthony's relationship with his siblings, and specifically his twin, Matthew. In the juvenile court, Samantha did not claim that Anthony had a sibling relationship with anyone other than Matthew. Furthermore, Anthony had not developed a relationship with Samantha's twin babies, who were born less than a month before the hearing. There is virtually no information in the record about Anthony's younger sister, who lived somewhere in Mexico. We therefore discuss only Anthony's relationship with Matthew.

The juvenile court found there was a sibling relationship but adoption would not substantially interfere with it, so the benefits of adoption outweighed the benefits of continuing the sibling relationship. In finding adoption would not substantially interfere with the relationship, the court said it "consider[ed]" and "rel[ied] upon" the foster father's statements he would preserve the sibling relationship, which were "somewhat born[e] out by the contact." The court observed the foster father "made an effort" to include Anthony's family in their extended family, "[n]ot for himself but for Anthony."

The foster father repeatedly stated he would preserve the sibling relationship, although he would reevaluate the situation if Samantha acted inappropriately or failed to show up for visits or if visits were not in Anthony's best interests. He facilitated sibling visits and maintained a working relationship with Samantha in order to promote sibling contact. He drove Anthony to visits at Samantha's residential facility, allowed a four-hour visit in early December 2006, and another visit on Christmas day. He enlarged family photographs Samantha gave him, framed them and displayed them in his living room so Anthony's whole family would be represented.

Samantha contends the juvenile court placed undue weight on the foster father's "empty assurances" he would maintain sibling contact, especially in view of the social worker's lack of experience in cases involving twins, and the foster father's failure to

understand the difference between adoption and guardianship.⁵ While the social worker had no previous cases with twins, that does not undermine the court's failure to apply the sibling relationship exception. Moreover, the foster father clearly understood that if parental rights were terminated, it would be his decision whether to allow sibling contact, and that with a guardianship, Samantha would retain her parental rights. The foster father preferred adoption because it afforded Anthony permanency. Finally, the juvenile court listened to the foster father's testimony that he would allow sibling visits consistent with Anthony's best interests. It found the foster father credible, a finding we will not second guess. The court acknowledged it did not "have a crystal ball" and found it would not be in Anthony's best interests to remove him from the prospective adoptive home, and the exceptions did "not apply to any extent that would derail [m]y finding adoption is the appropriate permanent plan."

The juvenile court did not err by failing to apply section 366.26, subdivision (c)(1)(E).

⁵ To the extent Samantha now asserts the Agency did not facilitate regular visitation until October 2006, her assertion comes too late.

DISPOSITION

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.